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IN THE

Supreme Court of the United States

October Term, 1961

No. 855

COMMONWEALTH EX REL. JAMES F. TORRANCE,

Petitioner

v.

JOSEPH SALZINGER, Warden of the Dauphin County Prison,

Respondent

BRIEF FOR RESPONDENT IN OPPOSITION

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STATEMENT OF THE CASE

(a) The Proceedings Below

Petitioner was convicted in the Court of Quarter Sessions of Dauphin County, Pennsylvania, on indictments charging him with conspiracy to defraud the Pennsylvania Turnpike Commission, of which he had been a member and secretary-treasurer, and misbehaviour in office as a member thereof. The convictions were affirmed by the Dauphin County Court, sitting en banc, *Com. v. Evans et al.*, 72 Dauph. 31 (1958). The convictions were affirmed by the Superior Court of Pennsylvania, except for one count

of the misbehaviour-indictment, 190 Pa. Superior Ct. 179 (1959). The decision of the Superior Court was affirmed by the Supreme Court of Pennsylvania, 399 Pa. 387 (1960). This Court denied certiorari, 364 U.S. 899 (1960), and also denied a petition for rehearing, 364 U.S. 939 (1961).

The petitioner's co-defendants have not attacked their convictions by federal process and are presently serving their sentences.

In none of these proceedings did petitioner assert that he had been denied due process because the evidence sustaining his conviction was only "scanty", or that it did not "in reason support the jury's finding of his guilt", the language used in petitioner's statement of the Question Presented here.

After this Court denied certiorari on petitioner's direct appeal, petitioner sought a writ of habeas corpus in the United States district court for the middle district of Pennsylvania. The written petition raised only two issues, namely, pretrial publicity said to have deprived petitioner of a fair trial, and the admission in evidence of the statement of a co-defendant, Paul, under instructions limiting the evidence to that co-defendant. Petitioner has now abandoned the issue of pretrial publicity. The Paul statement is the subject of a separate petition for certiorari, now pending in this Court.

The issue raised here, namely, the quantum of evidence in the record sustaining petitioner's convictions, was not brought into the case as a constitutional issue, until the oral argument before Judge Follmer in the District Court.

As to that issue the Court of Appeals held that petitioner, not having raised the issue as a constitutional ques-

tion in the state courts, had failed to exhaust his state remedies and that "proper deference to Pennsylvania dictates that the state courts be asked to consider the application of the rulings of the *Thompson* and *Garner* cases to the facts of the present case before we do so". The Court of Appeals did decide that there was no merit to petitioner's other grounds, namely, the pretrial publicity and admission of the Paul statement, and, accordingly, affirmed the judgment of the district court denying the petition for a writ of habeas corpus.

Following the decision of the Court of Appeals, petitioner applied for a writ of habeas corpus, on the issue of the quantum of evidence sustaining his convictions, in the Supreme Court of Pennsylvania, which took original jurisdiction of the application and held a hearing thereon. The Supreme Court of Pennsylvania, in a unanimous decision, including the two Justices (Bell and Jones) who had dissented from the prior decision of the court sustaining petitioner's convictions on direct appeal, denied the writ of habeas corpus, holding that the charges against petitioner were not "so totally devoid of evidentiary support as to render his conviction unconstitutional under the Due Process Clause of the Fourteenth Amendment", in the language of *Thompson v. City of Louisville*, 362 U.S. 199 (1960).

(b) The Evidence Sustaining Petitioner's Convictions

Torrance became a member of the Turnpike Commission in June 1943 (R. 5108).[1] From sometime prior to 1948, he was Secretary-Treasurer, until May 1956 (R.

[1] Page references are to the original transcript of the trial.

5127). Manu-Mine, a company with little experience and a corporate existence of only two years, began to get substantial Turnpike contracts in 1953, the first big contract being for work on the tunnels. At that time Torrance knew that Stickler, the head of the company, was the nephew of Chairman Evans' wife (R. 5132, 5243). Torrance voted to award Manu-Mine the tunnel contracts, as he did every subsequent contract, without competitive bidding, and without even raising the question of competitive bidding (R. 5201). For the tunnel work, Manu-Mine was paid $1,665,339.30 (R. 2609) and has claimed an additional amount of $93,564.20.

In May 1954, just before Manu-Mine was to be awarded another substantial contract and while Manu-Mine was being allowed to patrol the northeast extension of the Turnpike without any contract at all (R. 5138-5139), Torrance permitted Stickler to have Manu-Mine construct a trench silo on Torrance's farm (R. 5143-5144, 5285-5287). Five Manu-Mine employees worked on the job (R. 4324). On July 7, 1954, Manu-Mine was awarded a three-month contract for exploratory drilling on a twelve mile section of the Northeast Extension, to determine whether or not a program of subsurface support was necessary (R. 5138). This contract was extended a number of times, and under it, Manu-Mine was paid $376,962.60 (R. 2609). It was not bid (R. 5201).

The consulting engineers to the Commission had not recommended the expenditure of any sum for subsurface support (R. 5346). However, because of competitive bidding on other construction contracts, it became clear by July 1954 that there would be a substantial "underrun", resulting in an unexpected surplus of some $20,000,000.00

(R. 4665, 4625). Torrance knew of the availability of this unexpected fund (R. 4626).

In December 1954, just before the awarding of the biggest Turnpike contract which Manu Mine was to get, viz., the contract of February 28, 1955, Torrance received a gift certificate from Stickler, evidencing a continuing personal association. He spent it (R. 5141 5142, 5252). Torrance already felt at that time that Manu Mine would be the contractor for the drilling to be done for subsurface support (R. 5296). He admitted that Manu Mine was selected because they were "the people we wanted to do it" (R. 5224). Torrance was present with Chairman Evans in Wilkes Barre in January 1955, when the leak to the newspapers that Manu Mine already had the Turnpike drilling job caused the Chairman so much consternation (R. 4207, 4211). At that time Manu Mine was still engaged in the engineering phase of its work, under the contract of July 7, 1954, which was supposed to determine whether or not any subsurface support was necessary (R. 5181). That exploratory contract was not finished until the fall of 1955.

Prior to the Commission meeting of February 28, 1955, at which the new contract was formally approved, Torrance personally explained it to the new Commissioners, McSorley and Lawler (R. 5296). The meeting itself was one of McSorley's and Lawler's very first (R. 5294 5295). Lawler testified that at the meeting, before the motion was made to approve the contract, Torrance, along with Evans, recommended Manu Mine for its international reputation and impressed upon him that *"it was the only firm in existence at this time that was qualified to do that type of work* (R. 5685-5686). *Torrance never denied that he made that*

representation, either in his account of the meeting (R. 5140-5141), or in fact at any time, throughout his long appearance on the witness stand.

Actually, Torrance, when he made that representation, did not know what Manu-Mine's drilling experience was (R. 5239-5240); nor had he made any personal investigation of its qualifications for drilling (R. 5224). He did know that Manu-Mine had *only one drill* (R. 5312), and that they were not expert (R. 5237). Yet, this was the *biggest* drilling job in the Commission's history (R. 5188).

Torrance knew that jobs which should be bid are easy to determine because they *stand out* (R. 5208, 5214). The Commission itself, and not its engineers, is the final arbiter of that and has the responsibility for deciding whether or not to invite bids (R. 5306). Torrance did not ask the engineers if this contract should be bid (R. 5200), even though other Turnpike drilling jobs had been bid (R. 5229, 5237). In fact, the general rule of the Commission was to invite bids for drilling (R. 5187, 5199).

Torrance never questioned any of the prices for Manu-Mine's work (R. 5249-5250). Under the contract of February 28, 1955, the price was $12.50 a foot for drilling. Torrance did not check its reasonableness, and had no information on it, nor did he question the price (R. 5201, 5250, 5300), though he knew it was not the result of competitive bidding; that no one knew how much drilling was to be done (R. 5297); and that it was the biggest drilling job in the Commission's history (R. 5188).[2] He knew it

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[2] Dr. Cleaves, an expert witness for the defense, testified as follows:

"Q. Do you realize, Doctor, that there were somewhere in the neighborhood of 600,000 feet drilled?"

A. I do now.

was going to be expensive (R. 5174). Manu Mine's initial estimate for drilling was $4,120,000,000 (R. 5297). After the award of the contract, the estimated cost for the project *swelled* to $13,533,008,000; at one point it was contemplated that the total expenditure for drilling and slushing would be $19,500,000,000 (R. 5473), and later it was cut back to $9,350,000,000 (Torrance's Brief in the Pa. Superior Court, pp. 15/16). By the time of its suspension, Manu-Mine had been paid by the Commission $6,724,719,000 for drilling alone under the contract and claimed an additional $833,000,000 (R. 2954, 2955). It was paid an additional $121,722,000 for supervision, showing that the physical job of drilling far exceeded all other work. The profit derived from these payments was at least one hundred percent (R. 2975; 2976).

Contrary to the practice of the Commission, the contract was awarded without requiring Manu Mine to post any bond (R. 5303). A bond was posted several months later, when Chairman Evans was about to leave the Commission (R. 992, 4384). Also the usual ten percent retention clause, which had been in an initial draft of the contract, was eliminated (R. 4032, 4925).

Torrance, as Secretary-Treasurer, approved all of the checks for payments to Manu-Mine under the contract (R. 950 et seq.). The following schedule of huge payments, which followed each other in such rapid succession, should clearly have warned him that something was amiss, con-

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Q. What have you to say about that?

A. I wouldn't have built the road, either wouldn't have built the road or would have taken a calculated risk. That number of holes the whole proposition became *absurd*, in my opinion." (R. 4202) (Emphasis added)

sidering the known relationship of the company to the Commission Chairman (R. 950 et seq.):

$ 84,904.16—Paid 5/19/55
189,995.83—Paid 6/2/55
293,432.29—Paid 6/29/55
321,457.29—Paid 7/19/55
244, 520.83—Paid 7/27/55
513,100.00—Paid 8/24/55
430,784.37—Paid 9/13/55
274,693.77—Paid 9/27/55
137,903.13—Paid 9/29/55
756,052.08—Paid 10/21/55
360,845.83—Paid 11/2/55
325,190.45—Paid 11/15/55
424,714.58—Paid 12/12/55
665,937.50—Paid 12/22/55
590,712.50—Paid 1/10/56
575,897.91—Paid 1/20/56

While this was originally classified as an engineering contract to avoid competitive bidding, once it was awarded, it was given a construction contract number, in June 1955 (R. 986), because classifying it as a construction contract *expedited payments* (R. 988). If Torrance honestly believed it was an engineering contract, this assignment of a construction number coupled with the rapid succession of huge payments, again should have acted as a warning, but he raised no question.

In early 1956, Torrance learned that Richard Evans, the son of Chairman Evans, had been a shareholder and officer in Manu-Mine (R. 5132, 5133). It was incredible that he did not already know. A simple call to the Depart-

ment of State would have revealed Richard Evans as an original shareholder. Thereafter, he received the report of the Department of Mines which exposed Manu-Mine's program as unnecessary (R. 5155). Torrance persisted in his view that the program was necessary, and sent a copy of the Department of Mines' report to Manu-Mine (R. 5155).

ARGUMENT

The evidence in the record sustaining petitioner's convictions is ample, quite apart from the criteria of *Garner v. Louisiana*, 368 U.S. 157 (1961); or *Thompson v. City of Louisville*, 362 U.S. 199 (1960). Under the standards of those decisions it is a fortiori sufficient, since they set aside state convictions as violative of due process, only where the record was devoid of evidentiary support to sustain the convictions. This Court certainly did not contemplate in deciding those cases that it would be called upon to weigh the sufficiency of the evidence in routine cases such as that presented by the petitioner here.

Moreover petitioner argues that "the holdings in *Thompson* and in *Garner* . . . were not startling innovations in the field of federal constitutional law, but rather the natural and logical application, in the field of criminal convictions, of well recognized traditional constitutional principles which compel the conclusion that it is a violation of due process for a state to uphold a conviction entered upon a record so devoid of evidentiary support that a jury could not, in reason, have entertained the belief that the defendant was guilty of the crime charged". (Pet. for Cert. p. 9.)

If that is so, there was no excuse for petitioner's withholding that constitutional issue in his direct appeals through the Pennsylvania courts and in his prior petition for certiorari to this Court. Petitioner had full opportunity to raise this "traditional constitutional" issue at every stage of his appeals, but chose to inject it as a sort

of afterthought, not even in his written petition for a writ of habeas corpus in the district court, but only at the oral argument. Such a holding back of constitutional issues should not be condoned, and petitioner could well be deemed to have waived the issue. Cf. *United States ex rel. Williams v. Lavallee*, 276 F. 2d 645 (2d Cir. 1960), appeal dismissed, 362 U.S. 637.

In any event, under no constitutional test was petitioner denied due process with respect to the evidence sustaining his convictions.

CONCLUSION

For the foregoing reasons the petition for certiorari should be denied.

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